United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig. w affidavit of mailing

75-1101

To be argued by
CHARLES CLAYMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1101

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—against—

LAM MUK CHIU,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Docket No. 75-1101

UNITED STATES OF AMERICA,

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Preliminary Statement

Lam Muk Chiu appeals from a judgment entered in the United States District Court for the Eastern District of New York (Platt, *J.*) after a jury trial which convicted him of (1) conspiring between February, 1974 and August, 1974, to import and distribute quantities of heroin, a Schedule I narcotic drug controlled substance, in violation of 21 U.S.C. §§ 841(a)(1), 952(a) and 960(a)(1) and 18 U.S.C. § 2 (Count One), and (2) importing into the United States from Hong Kong a total of approximately 87 ounces of heroin, in violation of 21 U.S.C. §§ 952(a) and 960(a)(1) and 18 U.S.C. § 2 (Counts Two through Five, Seven and Eight).* Appellant was sentenced on March 18, 1975, to 12

* A charge of importing an additional approximately one-eighth ounce (Count Six) was dismissed.

years imprisonment and 15 years special parole term, on each count to run concurrently and is presently in custody.

Named also in all counts of the indictment were Chin Kin Man and Wong Han Kan. Prior to appellant's trial, Chin pled guilty to Count One of the indictment and was sentenced to 5 years imprisonment and 10 years special parole. Wong has not been apprehended.

On appeal, appellant claims reversible error in that (1) the trial court erred in not allowing expert testimony comparing the handwriting on letters in evidence to handwriting specimens prepared by the defendant specifically for this purpose, while awaiting trial, (2) the trial court admitted into evidence an address book seized from the defendant's attache case at the time of arrest, and (3) the Government failed to sustain its burden of proof and the trial court should have directed a verdict for the defendant.

Statement of the Case

(1)

The prosecution in this case arose out of a series of meetings and a sale of heroin in New York City in February, 1974, the exchange of letters and telephone calls between the appellant in Hong Kong and Harry Yip, a special confidential informant for the Drug Enforcement Administration of the Department of Justice [hereinafter DEA], in New York, and the receipt of six parcels containing a total of over five (5) pounds of heroin with a retail value of close to three million dollars (T. 627). Lam was arrested in New York on August 9, 1974 while negotiating the shipment of fifty (50) additional pounds of heroin with an undercover agent of the DEA.

The principal witnesses for the Government at appellant's trial were DEA special confidential informant Harry Yip and DEA Special Agents Mathew J. Maher, Edward J. Jason and Andrew G. Fenrich. The evidence at the trial included, among other things, (1) tape recordings of four telephone calls from Lam in Hong Kong to Yip in New York,* (2) tape recordings of ten telephone calls from Yip in New York to Lam in Hong Kong,** (3) ten letters from Lam in Hong Kong to Yip in New York,*** (4) six parcels containing heroin totalling approximately eighty-seven (87) ounces, (5) five cancelled checks in the total amount of $4,000 payable to Lam's wife, Madame Lee Pui Kwan, (6) a receipt for a $7,000 bank draft payable to Lee Pui Kwan, (7) Chase Manhattan Bank ledger sheets for the account of Lee Pui Kwan in Hong Kong, (8) Lam's certificate of identity book, Lee Pui Kwan's bank book, Lam's airline tickets and his United States identity papers (all seized from Lam's person in the search incident to his arrest), and (9) an address book (seized from Lam's attache case in the search incident to his arrest, and the only item in evidence which was so seized).

(2)

In February, 1974 Harry Yip was a special confidential informant in daily contact with DEA agents and assigned to locating, identifying and contacting known Oriental

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* American Telephone and Telegraph Company records of collect calls verify that these calls were placed by Lam from his home phone in Hong Kong (T. 569). Yip identified the voice as that of the appellant, Lam Muk Chiu (T. 80, 95, 112, 176).

** Six of these calls were placed from DEA headquarters in the presence of special agents. The four others were placed from Yip's home phone, and records of the New York Telephone Company verify the date and time of each call (T. 695). Yip identified the voice as that of the appellant, Lam Muk Chiu (T. 54, 64, 123, 139, 152, 199, 219, 237, 256, 261).

*** Each of these letters was opened in the presence of DEA special agents (T. 516-517, 583).

heroin dealers in the New York City area and setting up either purchases or seizures from them (T. 459). He testified that from February 4, to February 7, 1974 he met each day with Lam, Chin and Wong in an apartment at 422 East 11th Street, purchased approximately one (1) ounce of heroin from them for $2,400, and discussed future heroin deals with them (T. 21-36). On February 15, Lam requested and noted down the addresses of Yip and of Yip's father, and promised to call Yip from Hong Kong and to send heroin to Yip from Hong Kong (T. 40).* On February 16, Yip drove Lam to Kennedy Airport where they again discussed heroin importation. Lam promised to telephone and to write, and suggested the use of code words such as "pieces of clothing" and "Korean ginseng roots" when referring to heroin (T. 40-41).**

(3)

Towards the end of February Yip received the expected call from Lam in Hong Kong in which Lam told Yip that he had sent a letter including his address and telephone number (T. 44).*** On February 28, Yip received the letter

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* Agent Jason testified that these first five meetings with Lam, and Lam's involvement in the early stages of the conspiracy, were fully reported in Yip's daily reports in February (T. 492-494).

** These code words were used frequently in the telephone calls. *See, e.g.*, translated transcripts of the conversations of March 8 (T. 58-60) and March 28 (T. 83-94).

*** This first call was not recorded. Yip testified that he recognized Lam's voice from their previous conversations in New York (T. 44, 400-401). Unless otherwise noted, all calls mentioned *infra* were recorded, and the tapes thereof were in evidence.

Testimony as to the first call and transcripts of the subsequent calls were admitted over defense counsel's objections to identification of the Hong Kong party. The trial court repeatedly cautioned the jury as to the basis for admissibility, and the defendant's contention that it was not the voice of Lam. *See, e.g.*, T. 57 and 72.

[Footnote continued on following page]

containing Lam's address and telephone number (T. 51-53).* On March 8, Yip called the number specified in the letter and spoke to Lam. He was told by Lam that he (Lam) had sent some heroin to Yip's address and would send a letter explaining the mode of payment to be used (T. 58-60). On March 12, Yip received a parcel containing approximately two (2) ounces of heroin (T. 61-63).**

After another call to Lam to confirm receipt of the heroin, in which Lam informed Yip that on March 13 a letter had been mailed which would explain to him the mode of payment (T. 66-70), Yip received a letter from Lam on March 19, instructing him to mail a check to him, but to name Lee Pui Kwan as payee (T. 76-77).*** There followed a series of five letters and calls from Lam to Yip, during the course of which: Lam told Yip that he had mailed a parcel containing five ounces of heroin to Yip at his father's address (letter dated March 26, T. 107-108); the cancellation of a first check and the securing of a replacement was arranged; Lam gave an account number (KC 0599) for use on future checks (T. 115); and the financing of future deals was discussed. The parcel containing approximately five (5) ounces of heroin entered the United States on April 3.****

Similarly, each of the numerous letters from Lam was received in evidence accompanied by cautionary instructions as to the identity question and as to Yip's lack of prior knowledge of Lam's handwriting. *See, e.g.*, T. 75 and 107.

* All correspondence from Yip to Lam was sent to the address given in this letter. All telephone calls were placed to the number given.

** The parcel was opened in the presence of Agent Jason who took immediate custody of it (T. 495-498). As with all six parcels in this case, the heroin was secreted in a tin of Chinese tea.

*** Lee Pui Kwan was later identified as Lam Muk Chiu's wife (T. 596-598).

**** On that date U.S. Customs Agent Frank T. Caccaro, Jr., intercepted a parcel addressed to Harry Yip at his father's address and containing approximately five (5) ounces of heroin (T. 417-424).

A series of six more calls and letters preceded receipt of the next two parcels. In a call on April 4, Lam stated that he was thinking of a trip to New York in August or September (T. 133). In a call on April 15, Lam confirmed receipt of the replacement check (T. 159).* In a letter dated April 18, Lam stated that he had mailed two parcels, each containing ten ounces of heroin, one to Yip's address and one to the address of Yip's father (T. 198). These parcels entered the United States on April 22, and April 24 respectively.**

In a call on April 24, Yip confirmed receipt of these two parcels, Lam requested payment of $7,000 for them,*** arrangements were made for the shipment of two parcels with approximately thirty ounces of heroin in each, and Lam's proposed trip to the United States in August was discussed (T. 201-212).****

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* On April 5, Agent Jason had purchased this $2,000 replacement check and mailed it with a letter from Yip (T. 509-510, 583-585). A registered receipt for this letter was in evidence at the trial (T. 217). The bank ledger sheet which was in evidence indicated a deposit of $2,000 on April 16 for the account of Lee Pui Kwan (U.S. dollar savings account No. KC 0599). It also contains a subsequent notation: "Transferred to new savings passbook ledger card U.S. KC 0005" (T. 193). At his arrest Lam had on his person the savings account book of Lee Pui Kwan, No. KC 0005 (T. 619-620).

** On April 22, U.S. Customs Mail Specialist Fortunato Trimboli intercepted a parcel addressed to Yip at his home address and containing approximately ten (10) ounces of heroin (T. 427-431).

On April 24, U.S. Customs Agent John J. Ingria intercepted a parcel addressed to Yip at his father's address and containing approximately ten (10) ounces of heroin (T. 434-440).

*** On May 1, Agents Jason and Fenrich purchased a foreign bank draft in the amount of $7,000 made payable to Lee Pui Kwan. This draft was mailed to Lam (T. 514-515, 583-595). A receipt was in evidence at the trial (T. 588). Lam confirmed receipt of this check in a letter dated May 23 (T. 229).

**** The proposed trip was again discussed in calls on May 1, (T. 225) and June 5 (T. 248-249).

In a letter dated May 23, Lam wrote that two parcels, containing thirty and twenty-five ounces of heroin respectively, had been mailed, one to Yip's address and one to his father's (T. 229). On June 3, Yip received at his home address a parcel containing approximately thirty (30) ounces of heroin (T. 229-232).* On June 4, Yip received at his father's address a parcel containing approximately twenty-five (25) ounces of heroin (T. 232-235).**

(4)

In a letter dated June 11, Lam requested that Yip send traveling expenses for his upcoming trip to New York (T. 255).*** Four checks totalling $2,000 and made payable to Lee Pui Kwan were purchased and mailed to Lam on July 23, and the cancelled checks were in evidence at the trial (T. 588-590).

Yip met Lam at Kennedy Airport on August 9 (T. 266).**** They proceeded to a room at the International Hotel where Yip introduced Agent Maher acting in an undercover capacity as the brother of his purchaser. Yip acted as "interpreter" ***** and a deal was negotiated between Lam and Agent Maher for the importation of fifty (50) pounds of heroin from Lam's factory in Hong Kong. Maher

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* The parcel was opened in the presence of Agent Fenrich who took immediate custody of it (T. 574-577).

** The parcel was opened in the presence of Agent Fenrich who took immediate custody of it (T. 578-580).

*** Lam's visit, for the purpose of collecting $20,000 in payment for the last two parcels sent, was again discussed on June 13 (T. 259) and June 25 (T. 263), and in an unrecorded call on August 7 (in which the date, time and place of arrival were stated) (T. 265).

**** The details of this meeting were corroborated by Agent Fenrich, who also identified Lam in court (T. 590-592).

***** Agent Maher was in fact fluent in Chinese (T. 443-444) and his testimony corroborated Yip's account (T. 445-455).

left to arrange a signal for Lam's arrest. Pursuant to an earlier request from Agent Maher, Lam then wrote his Hong Kong address and telephone number on a paper which he gave to Yip to be given to Maher.* Maher returned to the hotel room, and shortly thereafter gave a prearranged signal upon which several agents entered the room and arrested Lam (T. 266-272).

Items seized from Lam's person in the search incident to arrest—(1) Lam's certificate of identity book containing his signature, listing Lee Pui Kwan as his wife, and indicating his return to Hong Kong on February 18, 1974 (T. 596-598). (2) Lam's airline tickets for the trip to New York City and return to Hong Kong (T. 320-622). (3) The passbook for account No. KC 0005 in account with Lee Pui Kwan (T. 619-620).

Item seized from Lam's attache case in the search incident to arrest—An address book containing the names and addresses of Harry Yip and Harry Yip's father (T. 613-614).**

There was no defense case.

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* This paper was handed to Maher upon his return to the hotel room and was in evidence at the trial (T. 454-458).

** Lam's United States I-94s (4 documents) indicating entry into the United States on January 8, 1974 and August 9, 1974, and departure on February 17, 1974 were also in evidence (T. 694).

ARGUMENT

POINT I

The District Court properly denied appellant's offer of expert testimony comparing the handwriting on letters in evidence to handwriting specimens prepared by the defendant while awaiting trial.

Appellant challenges the denial of an offer of proof comparing the handwriting on letters in evidence to three "standards" prepared by the defendant while awaiting trial (T. 687).* Judge Platt refused the offer as clearly subject to "the self-serving exemplar objection" (T. 665-666). Appellant's challenge is frivolous.

It should be noted preliminarily that appellant's claim that he was limited by his indigency to the form of exemplars offered is a claim without foundation. Appellant was granted a three month continuance to secure handwriting testimony (T. 677) and could have no doubt obtained exemplars from Hong Kong. In addition, Lam's signature on his certificate of identity book was in evidence at the trial. Defense counsel made no efforts to compare this with the letters.**

"Before . . . [it] . . . can be undertaken to establish the genuineness or spuriousness of a disputed writing, it is

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* The "standards" were prepared after Lam's arraignment, at the direction of his attorney, and specifically for purposes of comparison at the trial (T. 674, 690-691). They are not documents written in the ordinary course of business which may be admissible. *See, e.g., People* v. *Molineux,* 168 N.Y. 264, 61 N.E. 286 (1901) (used in the prosecution's case); *University of Illinois* v. *Spalding,* 71 N.H. 163, 51 A. 731 (1901) (offered by a party to show similarity).

** Other neutral evidence of appellant's handwriting included several arrest cards in the possession of the defense and his registration card at the International Hotel.

essential that some proved and acknowledged genuine specimens of writing of the alleged writer be obtained for purposes of comparison." *J. N. Baker, Law of Disputed and Forged Documents* 77 (1955). A specimen specifically prepared by a party for purposes of comparison is not "proved," and is therefore inadmissible. The principal opinion is *Hickory* v. *United States*, 151 U.S. 303 (1894), holding such evidence clearly objectionable, and explaining that:

> ". . . as remarked in *King* v. *Donahue*, 110 Mass. 155, 156, 'A signature made for the occasion *post litem motam* and for use at the trial ought not to be taken as a standard of genuineness.' 'It would,' as was said in *Williams* v. *State*, 61 Alabama, 33, 40, 83, 'open too wide a door for fraud, if a witness was allowed to corroborate his own testimony by a preparation of specimens of his writing for the purposes of comparison.' " *Id.* at 306-307.

The scientific basis for this universally accepted rule has been explained as follows:

> "Specimens of writing, offered by the defendant as being written by himself, may be either genuine or deceptive and disguised. The presumption is that such specimens are offered for personal interest and are not genuine or reliable for comparison. The inference is that the party accused of a crime, or whose writing is in dispute, will be prompted to disguise his writing in some part, or entirety, by writing a different style from his habitual one.
>
> Although a person cannot entirely change his character of writing at the moment, yet he may, by careful design and sufficient time, be able to change enough characters to distort his writing so that it will not be a natural and true specimen of his handwriting. . . . [S]uch prepared signatures have a color of suspicion coming under the class of evidence

known as self-serving declarations, and when offered by the defendant for comparison with the disputed signature will be excluded by the trial court.

Specimens of signatures cannot be admitted as evidence if they were written by the defendant in the presence of his attorney merely for use as standards of comparison in the trial to show that he did not write the disputed document. The law is clear that a person cannot manufacture evidence in his own behalf by voluntary writing." *Baker, supra* at 84.

Appellant quotes extensively from *Citizens' Bank and Trust Company* v. *Allen,* 43 F.2d 549 (4th Cir. 1930), a case distinguishing *Hickory* on two grounds: (1) that the federal statute permitting the introduction of admitted or proved specimens of writing for comparison had not then been passed; and (2) that the risk of deception inherent in the preparation of specimens secretly out of court is practically non-existent where specimens are produced upon a sudden request in court and before the jurors as witnesses. *Citizens' Bank and Trust Company, supra* at 551.

Former 28 U.S.C. § 638 (Now 28 U.S.C. § 1731) simply abrogated the common law rule requiring that a writing to be used for comparison must be properly in the case for other purposes. It has no effect on the question in the instant case, or on that portion of the *Hickory* opinion discussed *supra.*

The major premise of *Citizens' Bank and Trust Company* directly refutes appellant's contention in the instant case. In *Citizens' Bank and Trust Company,* the specimen was taken in court. In addition, the specimens therein were written at the direction of the court for use in the opponent's case, and were taken to prove similarity or identity of the handwriting to that in the disputed documents. Appellant on the other hand, volunteered his specimens to prove positive dissimilarity as part of his own case.

Appellant also refers to *Clark* v. *United States*, 293 F. 301 (5th Cir. 1923) and *United States* v. *Gillette*, 383 F.2d 843 (2d Cir. 1967). The specimens admitted in *Clark* were, as were those in *Citizens' Bank and Trust Company*, (1) written in court; (2) for use in the opponent's case; and (3) used to show that handwritings were the same, rather than to show positive dissimilarity. *Clark*, *supra* at 305. *Gillette* simply held that the use of expert testimony was proper to establish that signatures on fingerprint cards were in fact signatures by the defendant. *Gillette*, *supra* at 849.

Opinions on the admissibility of handwriting specimens offered in one's own behalf and prepared for the occasion have been infrequent. Nevertheless, such offers are uniformly refused. *See, e.g., Chemical Corn Exchange Bank and Trust Company* v. *Frankel*, 111 So. 2d 99 (Fla. App. 1960); *Johnson* v. *Crown Finance Corporation*, 222 S.W. 2d 525 (Mo. App. 1949).

Finally, putting aside the authorities on this issue for a moment, there is an underlying question as to whether, in this case, the handwriting testimony had sufficient probative value to outweigh the overwhelming evidence of appellant's guilt. (See argument, Point III, *infra*). This was apparent below in the discussions had in the absence of the jury. Thus,

> "The Court: . . . How does it help your case if I go back and say, you write the letter to Mr. Yip. How does it help your case any? . . . Whether I go back and direct you to write the letter to Mr. Yip or . . . whether I write them, . . . there is no difference at all, is there? If I go back——
>
> Mr. Rosenfeld: No.
>
> The Court: If I say, Mr. Rosenfeld, you write the letter to protect my handwriting, or I write these, there is no difference in culpability.
>
> Mr. Rosenfeld: That's correct" (T. 681).

POINT II

The District Court properly denied appellant's trial motion to suppress evidence legally seized from an attache case in the search incident to arrest.

Appellant challenges the admission into evidence of an address book * seized from the defendant's attache case in the search incident to arrest. His contention apparently is that this seizure from "a closed attache case" somehow transgressed the permissible limits of search incident to arrest as outlined in *Chimel* v. *California*, 395 U.S. 752 (1969). The contention is without merit because (1) the defendant waived his right to move to suppress the address book by failing to file a pre-trial motion; and (2) the search and seizure was perfectly proper.

(1)

When appellant belatedly raised his motion to suppress near the conclusion of the trial, the court noted that the motion was untimely and that the right to such a motion may have been waived (T. 604, 612), but, while reserving decision on the issue of timeliness, the court conducted a hearing. After the hearing the court found both that the motion was untimely and that the search was lawful (T. 609-613).

The rule of this circuit is that the legality of a search or seizure may not be raised for the first time at trial. *See United States* v. *Mauro*, 507 F.2d 802 (2d Cir. 1974).**

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* By reference to "items seized" (Br. at 18) and "items recovered" (Br. at 19) appellant somewhat obscures the factual basis of his argument. There was only one item seized from Lam's attache case—a small blue address book (T. 599-606).

** *Accord*, PROPOSED FED. R. CRIM. P. 12(b)(3).

The rule encourages orderly and uninterrupted trials of criminal cases and avoids the possibility of prejudice from delay. As was stated in *United States* v. *Sisca*, 503 F.2d 1337 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3281 (U.S. Nov. 12, 1974):

> "It is well settled that unjustified failure to make a timely motion to suppress evidence pursuant to former Fed. R. Crim. P. 41(e) (now Rules 41(f) and 12) . . . constitutes a waiver of that right. [Citations omitted]. This is so even when the district court, as here, considers the merits of the suppression motion as well as its timeliness [citations omitted]." *Id.* at 1349.

Appellant made no showing as to why this seizure could not have been challenged by a pre-trial motion. He was specifically informed of the existence of the address book several months before trial (T. 611). It had been available for inspection during the five months before trial (T. 604), and defense counsel was obviously familiar with the item when it was offered at the trial (T. 604-605).

The court properly ruled that the motion was untimely.

(2)

To invoke the doctrine of *Chimel* in an attack on the legality of the search of Lam's attache case is to enlist a sound constitutional principle in mere cavil. *Chimel* addressed the question of what protection the Fourth Amendment affords to premises where an arrest occurs, that is for example, to a dwelling or an office:

> "The only reasoned distinction is one between a search of the person arrested and the area within his reach on the one hand, and more extensive searches on the other." *Chimel, supra* at 766.

The doctrine does not extend protection to personal effects in the arrestee's immediate possession at the time of arrest.*

As stated by this court: "The examination of [an arrestee's] briefcase . . . presents no different constitutional issue than a search . . . of his suit pockets, or hatband, would present." *United States ex rel. Muhammad* v. *Mancusi,* 432 F.2d 1046, 1048 (2d Cir. 1970), *cert. denied,* 402 U.S. 911 (1971).**

The record reveals the actual circumstances under which the search was conducted in the instant case (T. 605-607). There was an arrest warrant. Contrary to appellant's characterization (Br. at 18), there is no indication that several arresting officers were holding the defendant at the time of the search. The record discloses that when the agents entered the room the appellant "was standing right next to his attache case" (T. 606), and was "making a move toward[s] [it]" when it was seized (T. 607). The attache case was within even the most restrictive interpretation of the "area into which an arrestee might reach," *Chimel, supra* at 763. There is no issue of temporal or spatial remoteness; the search was contemporaneous with the arrest and confined to its immediate vicinity.

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* "While the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence." *United States* v. *Edwards,* 415 U.S. 800, 808-09 (1974), *quoting United States* v. *DeLeo,* 422 F.2d 487, 493 (1st Cir.), *cert. denied,* 397 U.S. 1037 (1970).

** *Accord, United States* v. *Frick,* 490 F.2d 666 (5th Cir. 1973), *cert. denied,* — U.S. — ( ) ("The attache case was not isolated or hidden in some distant room of the house. . . . It was in plain view and readily accessible to [the arrestee]." *Id.* at 669); *United States* v. *Mehciz,* 437 F.2d 145 (9th Cir.), *cert. denied,* 402 U.S. 974 (1971).

Furthermore, recent decisions indicate that *Chimel* did not establish a restrictive requirement that a search incident to arrest must be justified by a need to prevent the use of a weapon or the destruction of evidence. *See, e.g., United States* v. *Edwards*, 415 U.S. 800 (1974).* As was stated in *United States* v. *Robinson*, 414 U.S. 218, 235 (1973):

> ". . . [T]he issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest [is not to be litigated in each case]. . . . A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search. . . ."

Logically, any item the size of an attache case must be seized before it can be searched. Appellant's argument leads directly to the untenable conclusion that whatever can be carried off by the arresting officers may not be searched until a warrant is obtained.

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* This is the clear implication of the holding that it is a normal incident of a custodial arrest to take from an arrestee the personal effects in his immediate possession which constitute evidence of the crime, and that anything once subject to a search incident to arrest remains indefinitely subject to search and seizure. *Edwards, supra* at 802-03, 805; *See People* v. *Perel*, 34 N.Y.2d 462, 466-67, 315 N.E.2d 452, 455-56, 358 N.Y.S.2d 383, 388-89 (1974); *cf. United States ex rel. Newsome* v. *Malcolm*, 492 F.2d 1166, 1174 (2d Cir. 1974), *aff'd sub nom., Lefkowitz* v. *Newsome*, 43 U.S.L.W. 4284 (U.S. Feb. 19, 1975):

> ". . . [The search incident to arrest exception] . . . does not reduce the level of constitutional protection because it retains the safeguard that probable cause must exist to justify the intrusiveness of the underlying arrest. . . . [I]n recently expanding the permissible scope of searches incident to lawful arrests, the Supreme Court placed great reliance on the existence of probable cause to arrest. . . ."

In this hotel-room arrest the agents had to take custody of the arrestee's belongings in any event, in which case an inventory search would have been proper.* Even if the agents had no duty to take the appellant's personal effects into protective custody, there were alternative grounds for the seizure, and therefore the search, in that an attache case used in a business trip is likely to contain business and financial documents and therefore, under the circumstances of this case, evidence of a crime.**

POINT III

The prosecution presented overwhelming evidence of the defendant's guilt and the District Court properly denied appellant's motion for a directed verdict.

Appellant contends that the Government's failure to record the defendant's voice at the scene of his arrest for comparison to the recorded telephone calls raises an inference that the calls were not made by the appellant, and that the jury should have been so instructed or the recordings of telephone calls excluded from evidence. Appellant further contends that the lack of expert voice identification,*** in combination with the absence of expert handwriting comparison, somehow rises to a failure of proof.

Identification of a party by one acquainted with his voice is the usual means of authenticating an antiphonal speaker. *United States* v. *Frankel*, 65 F.2d 285, 287 (2d

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* *See Cooper* v. *California*, 386 U.S. 58 (1967).

** *See Chambers* v. *Maroney*, 399 U.S. 42 (1970).

*** The Government's offer of expert voice identification was refused because the only available expert had served as defendant's interpreter at an earlier time (T. 659-665, 672-676).

Cir.), *cert. denied*, 287 U.S. 666 (1933).' At the trial Yip identified Lam's voice which he recognized from previous conversations (T. 54, 64, 80, 95, 112, 123, 139, 152, 176, 199, 219, 237, 256, 261). Yip's identification was more than the minimum required because "[t]he substance of the communication may itself be enough to make prima facie proof;" *Van Riper* v. *United States*, 13 F.2d 961, 968 (2d Cir.), *cert. denied, sub nom., Ackerson* v. *United States*, 273 U.S. 702 (1926), and circumstantial evidence is sufficient to identify a party to a telephone call. *United States* v. *Lo Bue*, 180 F. Supp. 955, 956 (S.D.N.Y. 1960), *aff'd sub nom. United States* v. *Agueci*, 310 F.2d 817 (1962), *cert. denied*, 372 U.S. 959 (1963); *accord, United States* v. *Alper*, 449 F.2d 1223 (3d Cir. 1971), *cert. denied, sub nom., Greenberg* v. *United States*, 405 U.S. 988 (1972); *Carbo* v. *United States*, 314 F.2d 718 (9th Cir. 1973); *Cwach* v. *United States*, 212 F.2d 520 (8th Cir. 1954).

The letters were competent evidence independent of any proof as to handwriting. The case presented a classic pattern of authentication by content or context. *See J. H. Wigmore*, 7 *Evidence* § 2148, at 605 (3d ed. 1940).** The interviews of February 15 and 16 and the series of letters and telephone calls exchanged thereafter form a complete secret correspondence consecutive in substance, each element of which was admissible based solely on its showing of familiarity with the others. The defendant offered no

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* Even testimony that the witness "thought" a voice on the telephone was the defendant's is sufficient to send the issue to the jury. *United States* v. *Easterday*, 57 F.2d 165, 167 (2d Cir.), *cert. denied*, 286 U.S. 564 (1932).

** WIGMORE § 2148:

> "If Doe is the sole person who knows the circumstances of an interview, and if a letter arrives purporting to be from Doe and stating those circumstances, and the statement appears by subsequent developments to be accurate, it would be a simple matter, for the law as well as for common sense, to deem that sufficient evidence of Doe's authorship had been furnished."

witnesses or circumstances to show another explanation. The jury was entitled to conclude that he had sent the letters or caused them to be sent.*

For further evidence of the appellant's guilt reference may be had to the within statement of the case, *supra* at 2-8, noting particularly the wealth of documentary evidence, and the circumstances of the arrest of appellant while he was negotiating the sale of fifty pounds of heroin to an undercover narcotics agent.

Appellant's motion for a directed verdict was properly denied.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

Dated: June 26, 1975

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
CHARLES CLAYMAN,
*Assistant United States Attorneys,***
Of Counsel.

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* *See* the comments of Judge Platt as to the lack of probative value of handwriting comparison in this case, *supra* at 12. The judge's careful instructions to the jury on this point should also be noted. *See, e.g.,* T. 75 and 107.

** The United States Attorney's office wishes to acknowledge the invaluable assistance of Morton J. Marshack in the preparation of this brief. Mr. Marshack is a third year law student at Hofstra Law School.

★ U. S. Government Printing Office 1975— 614—251—115

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 26th day of June 19 75 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Heitner & Rosenfeld, Esqs.
16 Court Street
Brooklyn, N. Y. 11201

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
26th day of June 19 75

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 2[illegible]501966
Qualified in Kings County
Commission Expires March 30, 1977